14-121

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE REPUBLIC OF SUDAN'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Plaintiffs-Appellees,

—v.—

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, aka ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, aka ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, aka ACCOUNTS AND ELECTRONICS EQUIPMENTS, *et al.*,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

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Interest of the United States

The panel construed the Foreign Sovereign Immunities Act ("FSIA") to allow service on a foreign sovereign via its embassy in the United States if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice. The United States has a substantial interest in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and preserving the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations ("VCDR"). Moreover, the government routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. The United States deeply sympathizes with the extraordinary injuries to the U.S. military personnel and their spouses who brought this suit, and condemns the terrorist acts that caused those injuries. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, as well as significant reciprocity concerns, the United States submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) in support of rehearing.

ARGUMENT

Point I—The Panel Incorrectly Permitted Service Through a Foreign State's Embassy

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allow-

ing U.S. courts to enlist foreign diplomatic facilities in the U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g.*, *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).[1]

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the em-

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[1] Thus, a witness in congressional hearings described § 1608(a)(3) as requiring service by "mail to the foreign minister at the foreign state's seat of government." Hearings on H.R. 11315 Before Subcomm. on Admin. Law and Gov't Rels. of House Comm. on Judiciary (June 4, 1976) (testimony of M. Cohen).

bassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that

Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "'[s]ervice on an embassy by mail would be precluded under this bill.'" (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister "*via* or *care of* an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), and there is no rationale for prohibiting service of papers at an embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to "minimize potential irritants to relations with foreign states," particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel's decision is contrary to the principle of mission inviolability and the United States' treaty obligations. The VCDR provides that "the premises of the mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or "as agent of a foreign government." *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("service *through* an embassy is expressly banned" by VCDR and "not authorized" by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator's view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'"); Brownlie, *Principles of Public Int'l Law* 403 (8th ed. 2008) ("writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel's contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be for-

warded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of "diplomatic documents and articles intended for official use." VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33 (same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States

vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

Point II—The FSIA Does Not Override the Requirement of an OFAC License

Although Sudan's petition for rehearing does not rely on this issue, the panel also erred in suggesting plaintiffs need not obtain an OFAC license before executing upon blocked assets under the FSIA.

As the panel noted (slip op. 22-23), the United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act ("TRIA") permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances "[n]otwithstanding any other provision of law." TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. (Slip op. 22 (addressing "whether § 201(a) of the TRIA *and § 1610(g) of the FSIA*" permit § 1605A judgment holder to at-

tach blocked assets without OFAC license) (emphasis added), 25 (turnover proper because execution sought "pursuant to the TRIA and 28 U.S.C. § 1610(g)")). As the United States has previously stated, where "funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs." Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state "shall not be immune from attachment," that language, consistent with the paragraph's title ("United States sovereign immunity inapplicable"), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA's broad "notwithstanding any other provision" language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

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November 6, 2015

Respectfully submitted,

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